1943

E. J. Huber and Ralph Dunkley v. Victor Newman : Brief of Respondents

Utah Supreme Court

Louis H. Callister; Attorney for Plaintiffs and Respondents;

Case No. 69166

In the Supreme Court
of the State of Utah

E. J. HUBER and RALPH DUNKLEY,
Plaintiffs and Respondents,

vs.

VICTOR NEWMAN,
Defendant and Appellant.

RESPONDENTS' BRIEF

APPEAL FROM THE DISTRICT COURT FOR SALT LAKE COUNTY, UTAH.

HON. BRYAN P. LEVERICH, *Judge.*

LOUIS H. CALLISTER,

Attorney for Plaintiffs and Respondents.

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STATEMENT

The plaintiffs and respondents in their Amended Complaint alleged that on or about the fore part of April, 1942, the plaintiffs and defendant entered into an oral agreement in which they agreed to enter into the contracting business and make bids and accept certain jobs in the intermountain area. That pursuant to this agreement the plaintiffs and defendant accepted certain jobs in the intermountain area and completed the same, the agreement further providing that the profits, if any, to be derived from any work to be divided one-third each. That if anybody furnished machinery or trucks that they

were to receive rental therefor, the same as any third party. Plaintiffs further alleged that they carried on said business under this arrangement on various jobs, and that the defendant had refused to account on certain of these jobs, namely, the Railroad Job, the Hospital Job and the Harrison-Dorman Job. That the plaintiffs and respondents introduced evidence in support of their allegations in the said Amended Complaint. Evidence was introduced that these parties entered into an agreement which they termed a partnership, and which the court found to be a joint adventure. That although the defendant and appellant, under oath, denied these allegations, alleging that the relationship on these particular projects was that of employee-employer, nevertheless, through his counsel, admitted that the relationship was that of a joint adventure. (Tr. 250-251) The court after determining that a joint adventure existed, then proceeded to an accounting between the parties. It appointed as a referee Mr. Wallace Dansie, who made his report to the court. The court approved practically all of the report. The plaintiffs and respondents contended that certain portions of the report were in error, and put on evidence to sustain their contention that the referee should have reported that more cubic yards of dirt had been put in the job known as the Hospital Job than that as submitted in his report, Exhibit "E". The court adopted the report with the modification of the evidence submitted in respect to the amount of cubic yards of dirt as put into the job known as the "Hospital Job." The court then rendered judgment in favor of

the plaintiffs and respondents and against the defendant and appellant in the sum of $19,451.03 as the amount due and owing from the defendant and appellant to these plaintiffs and respondents. The court before entering judgment had the referee, Mr. Dansie, testify in respect to the report. The defendant and appellant made no objections to the filing of the findings of the referee, nor did he file or make objections to the same. He also had ample opportunity to question Mr. Dansie on the findings.

ARGUMENT

These Respondents will answer the Assignments of Error as referred to in Defendant's and Appellant's Brief in the order in which they appear. The Defendant's and Appellant's First Assignment of Error is as follows:

> "The District Court had no jurisdiction to proceed to an accounting of the affairs of an alleged partnership until it has first judicially determined the existence of such partnership upon adequate evidence within the issues, and until after it has entered an appealable decree that defendant account."

In support of this assignment, the defendant and appellant relies upon the Utah case of *Rozelle v. Third Judicial District Court*, 39 P. (2d) 1113. We refer this court to the Utah case of *Gibbs v. District Court of the Third Judicial District*, 44 P. (2d) 504. The plaintiff in the Gibbs case sought to set aside assignments of certain mortgages and other documents connected therewith,

and have an accounting of all moneys received by the defendant by reason of such assignments. The District Court decided the issue in favor of the plaintiff, that the assignment should be set aside. The court then directed an accounting without making any Findings of Fact, Conclusions of Law, or Decree. The defendant contended that the trial court was without jurisdiction to proceed with the accounting until it had made Findings of Fact and Conclusions of Law, and had made and entered its Decree adjudging plaintiff in the lower court entitled to the property; further, defendant contended that he was entitled to have that issue fully determined by the trial court on appeal before he could be required to submit his books to inspection in an accounting procedure. The facts in this case are in substance identical with that before us. This court in the Gibbs case held that when a court of equity assumed jurisdiction to determine whether assignment contracts should be set aside, ordinarily has jurisdiction to settle the controversy, and if it finds contracts void, it then had the right to require an accounting of moneys received by the defendant during the time the property was in his possession, and had the further power to enter judgment for any amount found to be collected for which the plaintiff below was entitled. This court further held that in a suit to set aside assignment contracts and to recover property assigned and moneys collected thereon, court had jurisdiction to direct accounting, without first making Findings of Fact and Conclusions of Law and entering Decree adjudging plaintiff entitled to property in

suit. The court resolved the question involved as follows:

> "In a suit of this kind, is it the duty which the court expressly enjoins on a trial court to first enter judgment as to all matters in bar of the accounting before he can proceed to finish the case by directing an accounting and adjudicating the amount shown to be due in such an accounting?"

The court answers that question by saying that such procedure is not required by any statute or by any decisions of this court. The court further differentiates the Rozzelle case, and expressly holds that the Rozzelle case does not have a contrary finding to that of the Gibbs case.

The rule as expressed by this court is the rule of other jurisdictions. See:

Schesfski v. Anker, 15 P. (2d) 746;
Fox v. Hall, 128 P. 749;
Hallahan v. Sowers, 11 A. 263;
Smith v. Smith, 101 N. Y. S. 521.

Respondents' Second Assignment of Error

Defendant and appellant contends that there is no finding responsive to paragraphs one and two, alleging partnership, and paragraphs three and four, alleging breaches of duty in the Amended Complaint. The plaintiffs and respondents in their Amended Complaint alleged that the plaintiffs and defendant entered into an

oral agreement in which they agreed to enter into the contracting business and accept certain bids for certain work to be done in the intermountain area. Paragraph two of the Amended Complaint further set forth the fact that during the fore part of April, 1942, these plaintiffs and the defendant carried on and continued to carry on said business, and set forth the jobs which were uncompleted. It further set forth the fact that the jobs enumerated were undertaken by the plaintiffs and defendant jointly. The court in its Findings of Fact, paragraph one, recited in substance, that which was alleged by the plaintiffs in paragraphs one and two of their Amended Complaint. It certainly is responsive.

Paragraph three of the Amended Complaint recites as follows:

> "That these plaintiffs have at all times and in all things duly conformed to their understandings and done their part in all respects in accorandce with said understandings."

The findings as set forth in paragraph three of the Findings of Fact provide as follows:

> "That these plaintiffs have at all times and in all things duly conformed to their understandings and done their part in all respects in accordance with said understandings."

How could a finding be more responsive to an allegation?

Finding number four specifically sets forth that the said defendant, Victor Newman, refused to account for moneys received and expended in respect to the jobs set

forth. The complaint alleged that the defendant refused to account for moneys received. Paragraph four of the findings further sets forth that there was no definite term agreed upon between the parties of the said joint adventure. The finding is responsive to the allegations in paragraph four of the complaint.

The appellant further contends that there is no finding responsive to the negative issues contained in the first defense of the appellant. The first defense of the appellant as set forth in its Amended Answer and Counterclaim is that the Amended Complaint does not state facts sufficient to constitute a cause of action. This question was raised on Demurrer, and the court overruled the Demurrer of the defendant and the matter was disposed of. The fact that the court finds the material allegations of the complaint in favor of the plaintiffs and awards a judgment thereon is the same as stating that there is a cause of action in favor of the plaintiffs and against this defendant. It certainly is not necessary for the court in its findings to set forth the fact that the Amended Complaint does state facts sufficient to constitute a cause of action. The finding in favor of the plaintiffs is sufficient.

The appellant further contends that there is no finding responsive to paragraphs one, two, three and four of the appellant's third defense and counterclaim. The appellant in said paragraphs does nothing more than allege that the relationship between the respondents and appellant in the transactions as set forth, both in

the Amended Complaint and Amended Answer and Counterclaim, was that of employer-employee and not one of a joint adventure or partnership. Further, he alleges in his Amended Answer and Counterclaim that the acts of these respondents on said transactions were in breach of the contractual relationship, that is, that of master and servant (employer-employee); that the actions of the respondents were contrary to their agreement. The court in its findings sets forth the fact that the relationship on the transactions involved was that of a joint adventure, thereby negativing the contention of the appellant that the relationship was that of master and servant. It is not necessary for the court in making the finding that the relationship on the transactions involved was that of a joint adventure to set forth in negative terms that the relationship was not that of master and servant. By its statement that it was a joint adventure it without question disposes of the issue that the relationship was that of master and servant. In other words, if the court found that the relationship was that of master and servant, it would not be necessary to say it was not that of a joint adventure. Therefore, the finding of the court that the relationship was that of a joint adventure is responsive and disposes of the contention of the appellant in said paragraphs.

Paragraphs five, six, seven and eight of the Amended Answer and Counterclaim grow out of the contractual relationship of the appellant's allegations of the relationship of master and servant. If there was no such relationship, then, of course, the contention of the ap-

pellant as set forth in paragraphs five, six, seven and eight fall of their own weight, and there is no necessity of the finding of the court negativing the allegations thereof. The same argument goes to paragraphs nine, ten and eleven of appellant's Amended Complaint and Counterclaim.

In respect to the fourth defense and counterclaim, the appellant again sets forth the same contentions as it has in its Amended Complaint, that of the relationship of master and servant. Its fourth defense is merely as to a particular job, that is, the Fort Douglas Job. The fact that the court found that the relationship was that of a joint adventure disposes of the issue that there was the relationship of master and servant and, therefore, the breach of the relationship of master and servant, of course, falls of its own weight. There can be no breach of duty of the master and servant relationship, as the court found that none existed.

The Conclusions of Law are responsive to the Findings of Fact as made and entered by the court. The findings of the court, that the acts of the parties in respect to the transactions involved were that of a joint adventure in and of itself, negatives the relationship of master and servant. Therefore, any acts complained of by the appellant, growing out of the relationship of master and servant, and which is contrary to the finding of the court of that of joint adventure, falls of its own weight. The appellant in his Amended Answer and Counterclaim admits that the relationship alleged by him pertains to

the same transactions as alleged by the plaintiffs and respondents in their Amended Complaint in which it is alleged that that relationship was one of a joint adventure. The fact that the court finds that the relationship alleged by the plaintiffs was one of joint adventure, whereas the plaintiffs and respondents in their Amended Complaint refer to the word "partnership", does not in any way change the situation between the parties.

In the case of *Wells v. B. E. Porter Estate,* 272 P. 1041, the following statement is made by the court:

> "Appellant claims that the findings do not cover all the issues made by the pleadings, and particularly those arising under its affirmative defense. The court found expressly upon all the issues made by the amended complaint and the denials of the answer. These findings are inconsistent with the allegations of appellant's affirmative defense. They therefore were sufficient, and it was unnecessary to make particular findings as to the issues made by the affirmative allegations of the answer."

In the case of *Kendrick v. Gould,* 197 P. 681, it was stated:

> "Although a special defense may be set up in the answer, if there is not evidence to support it the appellate court must conclude that any finding which could have been made would have been adverse to defendant on that issue, to that, under such circumstances, the failure to find thereon does not require a reversal."

We feel that the case of *Phillips v. Stark,* 223 P. 443, is squarely in point. That case was an action on a con-

tract, in which the defendant denied the allegations of the complaint and set up a contract different from that alleged by plaintiff and pleaded the rescission thereof; court's failure to find on issue of rescission held not error, in view of findings that the parties entered into the contract pleaded by plaintiff, and that defendant had violated such contract, since the court, in making such findings, found by implication that the contract alleged in the answer was not made, and the question of whether such contract was rescinded therefore became immaterial.

In the case before us, the plaintiffs and respondents plead a certain contract of joint adventure and the defendant and appellant denied the same, alleging a master and servant relationship. The court by finding in favor of the plaintiffs and respondents of a relationship of a joint adventure by implication negatives any relationship of that of master and servant and, therefore, a specific finding upon any issue with respect to damages suffered as a result of a relationship which the court by implication negatives, is immaterial. Therefore, a finding on such points is not necessary.

As we interpret the contention of the appellant, it is to the effect that the court should find that there was no relationship of master and servant between the parties on the transactions involved, and we assume negative the various other allegations arising out of the contractual relationship as alleged of master and servant. This, of course, is not necessary in view of the fact that

the court found the opposite to be true; that is, that of joint adventure. It would only be superfluous and certainly unnecessary to set forth that there was no master and servant relationship. The court did that, and when it found there was a joint adventure, thereby refused to accept the contention of the appellant and in substance negativing the same.

RESPONDENTS' THIRD ASSIGNMENT OF ERROR

> "A party who, without being interested in property, is by agreement to receive as compensation for his services, and only as compensation, a certain proportion of the profits, and is neither held out to the world as a partner nor, through the negligence of the owner permitted to hold himself out to the world as a partner, is not a partner either as to the owner of third persons. The court failed to give effect to this principle by an appropriate finding of fact upon evidence responsive to the issues but in its remarks and rulings from the bench disregarded the same."

It is the further contention of the appellant that the court erred in failing to give effect to the principle that a party who, without being an interested party, is by agreement to receive as compensation for his services, and only as compensation, a share in proportion of the profits, and is neither held out to the world as a partner nor, through the negligence of the owner, permitted to hold himself out to the world as a partner, is not a partner either as to the owner or third persons.

In the first place, the court did not find that there was a partnership relationship, but found that in respect

to the transactions involved that there is a relationship of that of joint adventure. In other words, it is the contention of the appellant, as we interpret it from this Assignment of Errors, that the evidence is such that the court should have found that there was no partnership agreement, and also, no doubt, a joint adventure. Without referring to the testimony of Mr. Dunkley, one of the respondents and plaintiffs herein, the fact that there was a joint adventure on the transactions involved was admitted and proved by the appellant and defendant himself. The court interrogated Mr. Newman. (Tr. 147, 148, 149 and 150) In answer to the interrogations of the court, Mr. Newman made the express statements that he agreed to share profits with Mr. Dunkley and Mr. Huber on the Hill Field Job, The McKee Job, The Poulson Job, the Supply Depot Job, the Fort Douglas Job, and the Harrison-Dorman Job. Mr. Newman further stated that on these jobs the profits were to be split one-third to Mr. Dunkley, one-third to Mr. Huber, and one-third to himself. The profits to be split, however, after taking out the rental for the equipment used; that Huber and Dunkley would do the supervising.

At page 116 of the Transcript, a significant statement is made by Mr. Newman in respect to the Hospital Job, as follows:

Q. Now, when you found out you were going to make money on the hospital job, that is when you ceased to want these boys as partners, isn't it?

A. That is right.

As a matter of fact, the joint adventure of the parties was admitted by defendant's counsel, Mr. Morrissey. (Tr. 250-251)

> THE COURT: I think the record—perhaps Mr. Callister got this into the record, but to make sure, the court would like to say that it is admitted by all parties that Mr. Newman and Mr. Dunkley at least, were agreed that the joint venture would terminate on September 3rd.
>
> MR. CALLISTER: I think that is right, your honor, and we will so stipulate.
>
> MR. MORRISSEY: Yes.
>
> THE COURT: With that then in the record, I will sustain the objection.

It was the contention of the plaintiffs that Mr. Huber was a party of the joint adventure after September 3, 1943. However, the court found that there was only a joint adventure as to September 3, 1943, as stipulated by counsel as set forth above. I do not and cannot understand how the appellant and defendant can now come before this court and contend there was no partnership or joint adventure when it expressly so stipulated in open court.

The evidence is uncontradicted that the plaintiffs and respondents and appellant and defendant entered into a contractual relationship on certain jobs, the terms of which were as alleged in the plaintiffs' amended complaint. That is, that the three parties involved were to take jobs from time to time; that any machinery and equipment which was furnished was to receive a rental

price therefor; and the profits, if any, or losses, were to be divided equally among the three parties. Pursuant to this arrangement which was entered into in the month of April, 1942, many jobs were entered into. (Tr. 3 to 10, inclusive.) On the Hospital Job, as the same is termed, as well as the Harrison-Dorman job, the plaintiffs and respondents had an insurance policy with the State Insurance Fund for compensation insurance on the employees that were employed on these two jobs. (Tr. 10, 11, 12, and 13) That premiums were paid in accordance with the rules and regulations of the State Insurance Fund by these plaintiffs. This policy is known as Exhibit "A" in the transcript. (Tr. 14) The evidence is conclusive that funds were put into an account by all these parties, that is, the plaintiffs and defendant, which moneys were paid to employees on the Hospital Job. (Tr. 16)

Newman, after persistent efforts by the court to elicit the facts from him, admitted that the plaintiffs and respondents worked on the Hospital Job the same as they had on the other jobs enumerated in the complaint for approximately two and one-half to three weeks. (Tr. 154) Newman, who had changed his testimony from time to time particularly from that which he had sworn to under oath, in his amended answer, tried to have the court believe that he hired Mr. Huber and Mr. Dunkley on the Hospital Job. (Tr. 163) That he hired Mr. Huber as his foreman, notwithstanding the fact he claimed they were incompetent. Employees do not advance their own money to pay for employees of their employer, nor do

they carry compensation and do the things that were done in this case. The most significant statement that Newman could have made was to the effect that after he found out he was going to make money on the Hospital Job he did not want them as partners any more. On those jobs on which money was supposed to be lost they were his partners, but when any money was to be made, then they ceased to be his partners or to be in the joint enterprise with him. We refer this court to Transcript 182 in which the court interrogated Newman further. At this juncture the court was on the verge of taking action against Newman for testifying diametrically opposite to the facts plead in his amended answer under oath.

FOURTH ASSIGNMENT OF ERROR

> "The court erred in its conclusions from the bench that these were joint ventures on all these jobs mentioned in the complaint, that is the railroad job, the hospital job and the Harrison-Dorman job; the hospital job up to Sept. 3rd, because there were no written findings of fact upon evidence within the issues made or filed by the court with conclusions of law, and decree to account, made, filed or entered either before or after said conclusions from the bench. And the court erred in proceedings to the appointment of a referee in the absence of said jurisdictional pre-requisites."

The defendant and appellant is raising the same question as was raised in his First and Third Assignments of Error. We refer this court to the Gibbs case heretofore cited; also statements made by defendant and appellant's

counsel admitting joint venture heretofore quoted. This court had the right to order an accounting without first making Findings of Fact and Conclusions of Law and Decree determining that a joint adventure existed. The fact that the court in its opinion felt that a joint adventure existed and so found in its order heretofore referred to was sufficient and it had a right to proceed to an accounting.

FIFTH ASSIGNMENT OF ERROR

> "The court further erred in its order of reference, in that, neither by such order of reference, nor by any decree to account, nor otherwise, did the court require the parties to plead in accounting by serving and filing of any statement of account, counter statement, objections or exceptions to specific items of account by either party upon the other, so as to produce an issue of fact for trial, limiting and defining the scope of the evidence upon the trial of such issue on issues. A pleading, petition, affidavit or statement of claim or account of some kind or character is essential to confer jurisdiction upon a court to conduct a trial of a question of fact or law."

In this Assignment of Error the defendant and appellant again contends that the action of the court proceeding to an accounting was error in that there was no Findings of Fact, or Conclusions based upon evidence within the issues and the pleadings establishing partnership or other relationship or any breach of duty arising therefrom, and no decree ordering that either party account to the other.

The defendant and appellant in its Brief (Page 55) further states that had Findings of Fact and Conclusions of Law and Decree to account been previously made it would have required that the party liable be decreed to account forthwith, file a statement of his account with the opposing party, showing separately the debits and credits; that is, the receipts and disbursements. This is not the law in this jurisdiction and we again refer the court to the Gibbs case, (Supra). This court in that case stated with approval the following:

> "* * * In some jurisdictions the trial court may, whenever necessary, direct an accounting, either with or without the entry of an interlocutory judgment, and may take the proof itself or make a reference therefor. * * *"

In view of the fact that this court has held that an interlocutory judgment and decree is not necessary before the court may take an accounting, it necessarily follows that pleadings or statements of account need not be formally filed. If the court may take the proof itself it certainly has a right to require the defendant and appellant to produce books and accounts. It may ask the assistance to prepare and correlate the accounts and books of the party for presentation to the court, this being done, of course, to expedite the matter.

This court stated with approval in the Gibbs case, supra, the following:

> "* * * The trial judge announced his views as to certain issues, but not having made findings or entered a decree, the whole matter is still before

> him, and he may reach a different conclusion when the case is finally submitted. The manner in which he proceeds with the trial is discretionary and within jurisdiction. His discretion may not be controlled by this court. * * *''

Certainly the District Court did not err in its proceedings when it did not make Findings, Conclusions or Decree, but proceeded to have the account taken. Certainly no pleading is essential or necessary other than that originally filed in view of the statements by this court in the Gibbs case, supra. No Findings of Fact or Conclusions of Law or Decree are essential or necessary before the court could proceed to an accounting. Therefore, it had a right to proceed to an accounting based upon the original pleadings. As this court further said in the Gibbs case:

> ''a court of equity, assuming jurisdiction to determine whether assignment contracts should be set aside, ordinarily has jurisdiction to settle whole controversy, and if it finds contracts void, to require accounting of moneys received by defendants during time property was in their possession and to enter judgment for return of property assigned, and for any amount found to have been collected to which plaintiff is entitled.''

In the case of *Probst v. Bearman,* (Okla.) 183 Pac. 886, the plaintiff sued for the cancellation of an oil and gas lease. After determining the main issue in the case in favor of the plaintiff the Court proceeded with the trial and required the defendant to account for the oil and gas produced on the leased premises during the litigation, the Court holding that the accounting was

ancillary to the main cause of action. The Court held in this case that when the plaintiff succeeded in cancelling the lease his right to the oil and gas produced on the premises during the litigation followed as a natural sequence, and in support of its holding cited 1 C. J. 616 (Supra).

Defendant and appellant's whole basis for reversal as we see it is upon the theory that the court did not first make and enter Findings of Fact, Conclusions of Law and Decree, and, therefore, could not order an accounting. The Gibbs case (Supra) definitely disposes of that issue.

SIXTH ASSIGNMENT OF ERROR

> "The court erred for the same reasons last specified in proceedings to a trial of unknown issues, or no issues of fact defined by any pleading of the parties, and to hear evidence directed to no specific issue of fact, and upon no written pleadings, and to make findings thereon, sounding in accounting. Thereby acting without jurisdiction."

The defendant's sixth assignment of error is in substance the same as that of the fifth, and, therefore, it is unnecessary for us to amplify our argument further in respect to the sixth assignment of error.

SEVENTH ASSIGNMENT OF ERROR

> "The court erred in its said proceedings in receiving or considering any evidence or testimony because it was proceeding without jurisdiction for

> the reasons already stated, and especially in receiving in evidence and in taking judicial notice of any of the contents of the document."

The defendant and appellant again refers to the same contention that the court proceeded without jurisdiction for the reasons stated in its other assignments of error. That is, that the court could not proceed to an accounting until it had made its Findings of Fact, Conclusions of Law and Decree. We have heretofore discussed this at length. It further states that the court erred in receiving evidence and taking judicial notice of plaintiff and respondents' Exhibit "E", which was Wallace Dansie's report. This report was submitted without objection from the defendant and appellant. When the same was offered in evidence (Tr. 201) Mr. Morrissey, attorney for the defendant and appellant, stated that it could be filed and thereby making no objection to the same being received by the court. We must remember that this is a case in which the defendant and appellant from the beginning insisted there was no joint adventure, but subsequently upon cross examination admitted the same. That in order to expedite the trial of this cause the court saw fit to refer this matter. At transcript 201 Mr. Dansie stated that he asked them (referring to all the parties; that is, the defendant and the plaintiffs) for their books, and that there was submitted to him all the books and records of the enterprise, on the jobs in question in this controversy. After Mr. Dansie had gone over the books as submitted to him, he made his report of which he served copies upon the parties who had ample

opportunity to determine the correctness of the same. Notice was served upon the defendant and appellant (Tr. on Appeal 80) giving them notice that the same would be submitted to the court and notifying them that if they had any objections to the same to present the same at that time. The defendant and appellant saw fit to make no objections to the same, and as heretofore stated, did not object to the report being filed. There was no evidence introduced that the computations as found by Mr. Dansie were incorrect. The report of Mr. Dansie referred to as plaintiff's Exhibit "E" did not attempt to resolve the issues of fact in favor of any party. The defendant at no time contended at the trial, nor are we to find from his Brief that the figures as found by Mr. Dansie were incorrect. That the court upon receiving no objections from the defendant, received the same. Plaintiffs' Exhibit "E", the report of Mr. Dansie, was subject to the cross-examination of the defendant as to its correctness. Certainly, to expedite a matter of this kind the court has a right to request assistance from an accountant, and where his report is admitted without objections, no error has been committed by the court. The appointment of Mr. Dansie was for the purpose of having a bookkeeper correlate and reduce to an ultimate figure the debits and credits of the parties from the books given to Mr. Dansie by the parties involved. That statement of debits and credits was filed without objection. At transcript 208 the record clearly shows that all the records were present at the hearing. The attorney for the plaintiffs and respondents requested that

all records be brought at the hearing. (Tr. 208) The records were there for the purpose of examination by all parties in the event they did not agree with the compilation of the same by Mr. Dansie. The court gave all parties the opportunity to question Mr. Dansie in respect to his report. The plaintiffs and respondents did not agree with the figures of Mr. Dansie in one respect and, therefore, introduced evidence by Mr. Dunkley, one of the plaintiffs herein (Tr. 223, 224, 225) showing the amount of loads and yardage on the hospital job. Mr. Dunkley's testimony in respect to the yardage on the Hospital job is uncontradicted by any testimony whatsover and the court saw fit to accept the same, which was proper.

Eighth Assignment of Error

"The said referee report, plaintiffs' exhibit A, was void on its face, and on the face of the record for the reasons that:

(a) The author thereof, Mr. Dansie never qualified by taking the oath required by Utah Const. Art. VI, Sec. 10 and Utah Annot. Code, 1943, 104-27-7,

(b) The author thereof never proceeded in conformity to Utah Annot. Code, 1943, 104-27-6, to give notice to the parties, conduct a trial, hear sworn testimony, make findings of fact and conclusions of law, and to report the results thereof to the court,

(c) The author thereof proceeded, on the contrary to interview various persons ex parte, out of the presence of defendant and his counsel, to make private inquiries, and to receive and consider unsworn hearsay statements, oral and written, from

various unknown persons; and to receive and consider the contents of sundry written books, records and documents submitted to him by plaintiffs and by unknown persons without the oaths of attesting witness or witnesses, and out of the presence of defendant and his counsel; and to compile a report based upon unsworn hearsay statements of persons, books or documents unknown to the defendant,

(d) By these and other steps and proceedings unknown to and forbidden by law the author of the report purported to make and state an account wherein and whereby he resolved all questions and doubts in his mind against the defendant and in favor of the plaintiffs, and refused to consider statements of claim by third persons which, if allowable, were just claims in accounting in the nature of operating expenses which must first be deducted from gross income, before striking any balance in accounting,

(e) The author of said report was never lawfully appointed referee to take or state an account, because the court was without jurisdiction to make the order of appointment, in the absence of any prior findings of fact and decree to account; and also because there were no written pleadings or issues defining the issues and limiting proofs in accounting to specific items of debit or credit, charge or countercharge in account."

These plaintiffs and respondents assert that the referee's report, plaintiffs' Exhibit "E", was not void on its face for any reasons whatsoever. The defendant and appellant contends that the author thereof, Mr. Dansie, never qualified by taking the oath required by the laws of Utah. There is nothing in the record whatsoever showing that Mr. Dansie did not take the oath or

that he did take the oath of office. The record shows that Mr. Dansie was sworn as a witness (Tr. 194) at the time he was put on the stand in respect to his report to identify the same and to submit to cross examination regarding the same. The record is silent as to his being sworn in any other respect. We refer this court to 45 Am. Jur. Page 556, Section 19, in which it is stated as follows:

> "Where the record is silent on the question whether the referee was sworn, the presumption is that he took the oath as prescribed by law, since all officers are presumed to do their duty."

The question whether the referee was sworn or took his oath was never raised by defendant and appellant at the trial, and he had ample opportunity to do so if he desired. If the defendant and appellant had had an objection he should have made the same at the trial. An objection that the referee was not sworn is waived by appearing and going to trial. See 3 Am. Jur. Page 417, Section 872, Note 16. It is fundamental that the failure of an injured party to call the attention of the trial court to the alleged error at the time it occurs, or at least when it is still in the power of the trial court to correct it, amounts ordinarily to a waiver of the error or creates an estoppel against bringing it to the attention of the trial court. See 3 Am. Jur. Page 417, Section 872.

The defendant and appellant further contends that Mr. Dansie proceeded contrary to the laws of Utah with respect to conducting a trial, hearing testimony, etc.

Further, that the referee did not make any findings. We are not so concerned with the form of findings as to the fact that findings were made and that they were of benefit to the court, which it could adopt in whole or in part. Such findings as made by Mr. Dansie were very intelligent, helpful and correct. They were such findings that the court saw fit to adopt with some modification. It is the general rule that the master's findings should be sustained unless they are manifestly, palpably, or clearly appears to have been error or mistake upon his part. See 3 Am. Jur. Page 482, Section 913, Note 3. Certainly there is no manifest or even a slight indication of error in the report of Mr. Dansie. The defendant and appellant was given every opportunity to question the referee on his report, to examine the same, to make objections and fully protect his interests in every way. The fact that he did not do so is ample evidence that he admitted the correctness of the same. If there was error at that time why was it not raised? Why raise error, (which we strenuously contend does not nor did not exist) now that could have been raised in the event that such had been made at the proper time before the trial court?

When evidence is not reported in the referee's findings, the findings are nevertheless final and cannot be disturbed on appeal. See 3 Am. Jur. Page 42, Section 913, Note 9.

A referee should report the facts found and not the testimony. Except where the testimony is excepted to, and then the ground of objection and the decision thereon

should be stated. He is not required to state every subsidiary circumstance supporting his ultimate conclusion as to the facts, nor to summarize evidence not given credence by him, nor to narrate matters having no probative force in his final determination. See 45 Am. Jur. Page 567, Section 36.

As stated before, defendant and appellant saw fit to consent that the report be filed; saw fit to make no objections to its correctness; had opportunity to cross examine referee on all points. However, he did so on some portions of the same. It is fundamental that if a party desires to challenge the findings of the referee he should do so within the proper time and if he fails to do so and the report is confirmed, he is bound by the findings and cannot be heard to dispute their truthfulness or escape the legal consequences flowing therefrom. See 45 Am. Jur. Page 570, Section 39, Sections 14 and 15. A report and objections filed thereto make an issue. If no objections are filed there is no issue in respect to the findings.

The referee was lawfully appointed, made his report; the court saw fit to adopt in substance the whole thereof, making some changes after hearing evidence. We take the position that if there was error, which we emphatically contend there was not, in respect to the appointment and proceedings of the referee, then defendant and appellant had ample opportunity to make his objections; he had ample opportunity to do so. He saw fit at the time of the trial not to make objections

and, therefore, he cannot now at this time make objections that he had ample opportunity to make at the trial of this cause.

The plaintiffs and respondents did not agree with the numbers of yards as reported by Mr. Dansie and thereby put on evidence by Mr. Dunkley. (Tr. 233) Mr. Dunkley testified to the exact amount of yardage, which testimony the court accepted and received and thereby modified the referee's report in respect thereto. Mr. Newman was present in court with his books, had ample opportunity to cross examine Mr. Dunkley and to submit evidence contrary thereto if Mr. Dunkley was in error. This he did not do, the reasons being that the testimony of Mr. Dunkely was correct in respect to the amount of yardage hauled at the Hospital Job. This evidence being uncontroverted, the court had the perfect right to accept the figure as being correct. Mr. Newman had ample opportunity to show that the 69c paid per cubic yard was incorrect and that the 59c figure should be used. He had the contracts in court. It is uncontroverted that 69c was the contract price for the cubic yards of dirt to be hauled on the Hospital Job. The mere fact that the original contract was 59c, but later changed to 69c, does not deprive the plaintiffs and respondents as members of the joint adventure from receiving the increase. Why should Mr. Newman benefit at the expense of his fellow members in the joint adventure?

The defendant and appellant further contends that the report did not take into consideration claims of third

parties in arriving at the balance due between the parties; that said claims were allowable. This, of course, is ridiculous. The members of the joint adventure are liable for the obligations of the joint adventure. The fact that certain parties claim amounts due that have not been paid by any member of the joint adventure in an accounting cannot be allowed in favor of one of the members of that joint adventure. In other words, the defendant and appellant wanted the trial court to deduct from the amount due from him to the plaintiffs and respondents claims of third parties which he had not paid and was no more liable for than the other two members of the joint adventure. The plaintiffs and respondents denied that any third party claims were proper and insisted they were not due and owing. In other words, a controversy existed between plaintiffs and respondents and defendant and appellant in respect to whether claims of third parties which were not taken into account by Mr. Dansie should be paid. It is inconceivable to see upon what theory the trial court could allow these claims of third parties, when not paid by Mr. Newman, and when all members of the joint adventure were responsible therefor. The court had a perfect right to refuse to take into consideration in allowing the account the contested claim of the third parties in view of the fact that the members thereof were not in agreement that any amount was due and owing.

NINTH ASSIGNMENT OF ERROR

"The findings of fact made by the court as a result of the attempted accounting without or in

> excess of jurisdiction, insofar as they attempted to respond to the original issues of partnership or employee relationship between the parties and duty to account, were too late, were insufficient and unresponsive to most of the issues in that respect in the amended complaint and amended answer and counter-claim, and did not confer jurisdiction in accounting."

It is well settled that where an accounting is necessary to the full determination of a controversy, a Court will proceed to hear it so that the whole controversy may be determined in one action.

> "Where a court of equity assumes jurisdiction of a controversy on some ground other than the accounting involved, it will, as a general rule, where an accounting is necessary to a full settlement of the controversy, proceed to decree it, and will settle the whole controversy, even to the extent of adjudicating matters of purely legal cognizance. If, however, the allegations of the bill creating equitable cognizance are not sustained, the jurisdiction will follow, and a mere demand for an account, in the absence of other or equitable circumstances, will not be enough to require the retention of the cause." 1 C. J. 616.

TENTH ASSIGNMENT OF ERROR

> "The finding of fact were unlawful because made in response to no pleading, and no definite issue defining and limiting proofs, and because the same were repugnant to the proofs accepted and heard by the court without any issues in accounting."

We refer to the citation set forth under assignment nine and statement to answer assignment of error ten.

ELEVENTH ASSIGNMENT OF ERROR

> "The findings of fact were unlawful and void because it rested almost entirely upon the void report of Mr. Dansie acting as referee and containing only the results of unsworn hearsay statements of various persons received out of the presence of defendant. Without said hearsay report there was no evidence to support the findings as to profits earned, items deductible, or balance proposed to be divided."

We again repeat that Mr. Dansie as an accountant and bookkeeper compiled certain information from the books and records of the parties for the purpose of expediting this matter. He brought the same to the court and stated that he took them from the records of the defendant and plaintiffs. His compilation of the books was accepted without objection by any of the parties. He was doing nothing more than being of assistance to the court and reducing to concrete form the debits and credits of the various parties so that the same could be submitted to the court and the parties have an opportunity of contesting any part of the same. They elected not to do so and accepted the same without objection.

TWELFTH ASSIGNMENT OF ERROR

> "The court erred in refusing to consider evidence before it and in rejecting other like evidence, showing that defendant was injuriously debited in accounting with ten cents per cubic yard on 72,676.05 cubic yards of material hauled by Newman on the hospital job, and plaintiffs credited therewith, for which Newman paid and performed the sole consideration in the haulage thereof."

There is ample evidence to support the finding of the court as to the number of cubic yards hauled on the Hospital Fill Job. Mr. Newman received 69c per cubic yard and, therefore, the parties to the joint adventure were entitled to the same as he received.

THIRTEENTH ASSIGNMENT OF ERROR

> "The trial court in its findings and rulings with respect to an asserted change order made in defendant Newman's contract with the government on the hospital job and in crediting plaintiffs with two-thirds of the benefit thereof in which they had no interest."

The change order made in favor of Mr. Newman, of course, went to the benefit of the other members of the joint adventure. How can a party to a joint adventure contend that he is entitled to more than the other members when he has admitted that they were to divide one-third each.

FOURTEENTH ASSIGNMENT OF ERROR

> "The trial court erred in making conditional findings, and in requiring the giving or filing by defendant, or by either party, of an indemnity bond as a condition to relief from, or abatement of, any portion thereof."

We cannot understand the objection by the defendant and appellant as set forth in the above assignment of error to the judgment of the court. The conditions as set forth therein was for the sole benefit of the defendant and appellant. He cannot be prejudiced as a

result of the same in any respect. The judgment simply stated that these plaintiffs and respondents could not execute on the full amount of the judgment unless and until it had given to the defendant an indemnity bond in the sum of $7,000.00, to protect it against any claims by third parties as set forth therein, and in addition, to renegotiation of contracts. This meant that a portion of the judgment, that is, $6,808.00, the plaintiffs and respondents could not execute upon until such time as this bond was delivered. It simply gave the defendant and appellant the right and option to require this bond if it so desired; and in fairness to the plaintiffs, the defendant must give to them an indemnity bond, also. The defendant did not have to put up a bond, and if he refused to do so the plaintiffs and respondents would then have a right to execute upon the full amount of the judgment. The only parties who could have been prejudiced in any way were the plaintiffs and respondents. The court in this case had a right to make a condition, if it so desired, in fairness to all parties, and when the defendant and appellant was not prejudiced, it certainly could not complain.

Fifteenth Assignment of Error

> "The final judgment was void for each of the reasons hereinbefore specified with respect to the issues, evidence and findings, and because unsupported by issues or evidence. Also because of its requirement that a bond or bonds be filed as a condition to relief from a portion thereof."

This assignment is what may be termed a "catch all" to follow the other assignments of error set forth in plaintiffs' brief. He sets forth in this assignment that the judgment was void because of its requirement that a bond or bonds be filed as a condition to relief from a portion thereof. Again we respectfully inform this court that under the terms of the judgment the only party who could complain would be the plaintiffs and respondents. All it gave was the right and option to the defendant, if he so desired, to require a bond from these plaintiffs and respondents to indemnify him, before they could execute on the whole thereof. It was nothing more than an option which he could exercise or not, as he saw fit. Under no conditions or circumstances could he be prejudiced or injured in any way. Therefore, he cannot complain. We are at a loss to understand why he should complain against a condition which was made for his sole benefit and use, with the option to accept it or not, as he saw fit.

CONCLUSION

The court properly concluded that there was a joint adventure between the parties hereto inasmuch as the defendant and appellant, through his counsel, admitted the same; that an accounting was, therefore, in order and proceeded to take the same. That the same was taken properly and in accordance with the laws of the State of Utah. It seems odd that the defendant and appellant would not at the trial of this case raise the

same objections that he has now raised before this Appellate Court when he had ample opportunity to do so. The fact that this defendant and appellant swore under oath in his Amended Answer and Counterclaim that no such relationship existed; and then admitted the same, proves to us that he is attempting in every way to find some technicality to avoid payment of that which is due his fellow members of a joint adventure. We respectfully submit that the court did not err in any respect, and that the judgment of the trial court should be affirmed.

LOUIS H. CALLISTER,

Attorney for Plaintiffs and Respondents.